Supreme Court, U.S.
FILED

041143 FEB 22 2005

OFFICE OF THE CLERK

No. 04-

IN THE

Supreme Court of the United States

BANNER RESTORATIONS, INC.,

Petitioner,

v.

BRICKLAYERS LOCAL 21 OF ILLINOIS APPRENTICESHIP AND TRAINING PROGRAM AND MASONRY INSTITUTE BRICKLAYERS LOCAL 21 PENSION FUND

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

GERARD C. SMETANA*
SMETANA & AVAKIAN
39 S. LaSalle Street
Suite 1218
Chicago, IL 60603
(312) 357-0250

* *Counsel of Record*

Attorneys for Petitioner

192782

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Whether Section 302(c)(5)(B) of the Labor Act (29 U.S.C. § 186(c)(5)(B) which only permits payments to be made to a trust fund in conformity with the terms "specified in a written agreement with the employer" is satisfied by coerced monthly contributions to Labor/ Management Trust Fund in the face of threats to interfere with the business of the employer by Trust Fund Representatives to coerce the payments, in the face of continued refusal by the employer to sign or acquiesce in an agreement and in the absence of any "written agreement" with the employer Petitioner.

2. Can an area collective bargaining agreement not governing the Petitioner's employees and never acquiesced in, manifest an intent to be bound solely by making monthly payments to Respondent Trust Funds, in the face of such payments being coerced at the beginning of each job and in the absence of any language on the monthly report forms incorporating all the terms of a Collective Bargaining Agreement specifically for the employees of the employer.

3. Was it error for the Court below to affirm an adverse credibility resolution that monthly payments to Respondent Funds was solely in response to such coercion set forth in Stipulation No. 23 and 29 after contribution to the Funds and payment of union wages and benefits and use of union apprentice program for workers in the face of stipulated refusal to sign an agreement or entry into a written agreement as mandated by Section 302(c)(5)(B) of the Labor Act.

4. Did the Court below commit error by inferring a manifest intent by the employer to be bound by a "course of conduct" in the absence of a "written agreement" without regard to coercion.

5. Must trust fund monies by returned to the employer if they were submitted as a mistake of fact or law where the employer submitted payments in the absence of a written agreement without the need for balancing equities normally required for restitution and additionally in the face of the unclean hands of the Trust Funds in retaining such monies and engaging in coercion to obtain payment.

LIST OF PARTIES

This Parties below are listed in the caption: The parties are Banner Restorations, Inc., Petitioner v. Bricklayers Local 21 of Illinois Apprenticeship And Training Program And Masonry Institute and Bricklayers Local 21 Pension Fund, Respondent.

There are no amicus curiae.

CORPORATE DISCLOSURE STATEMENT[1]

Banner Restorations, Inc. is an Illinois representative in good standing whose sole shareholder is Charles Ciancanelli and has no parent corporation and is not subsidiary to any other corporation.

Petitioner Banner Restorations, Inc.[2] petitions for Writ of Certiorari to review the Decision of the United States Court of Appeals for the Seventh Circuit issued in this case on September 22, 2004. That Decision, affirmed the Decision of the District Court denying Petitioner's Counterclaim for refund of pension payments made to certain specified Respondent ERISA Trust Funds by reason of mistake of fact or law. Respondent had initially filed a law suit seeking compliance with the audit requirements under ERISA to which Petitioner filed Counterclaim seeking return of only a portion of the contributions dealing with Pension and Annuity Trust Fund contributions paid as a mistake of fact or law under a Federal Common Law Restitution cause of action

1. Corporate Disclosure Statement required by U.S. Supreme Court Rule 29.6.

2. Inadvertently referenced as Banner Restorations, Incorporated, Defendant/appellant in caption of Decision below.

(see unpublished Memorandum Opinion and Order of the District Court - Appendix B - Affirmed by a Panel Decision of the United States Court of Appeals for the Seventh Circuit based upon a finding of manifest intent binding Petitioner to a collective bargaining agreement through course of payment to the Funds over a period of seven years even though there was no written agreement between the employer Banner with any labor organization that represented its employees and even though Stipulations of Facts entered at Trial acknowledged coercion to obtain such contributions to the Funds and acknowledged the employer's position that the reason it made the monthly payments was due to such coercion.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	iii
Corporate Disclosure Statement	iii
Table of Contents	v
Table of Cited Authorities	vii
Table of Appendices	ix
Opinions Below	1
Statement of Jurisdiction	1
Statutory Provisions Involved	1
Statement of the Case	2
I. A Course of Conduct Cannot Substitute For the Mandatory "Written Agreement"	2
II. There Is A Clear Conflict With The Second Circuit	7
III. All Relevant Facts Were Stipulated	8

Contents

	Page
IV. The Seventh Circuit Erroneously Relied Upon A Course of Conduct To Support An Agreement In Reliance Upon Cases In Which There Was An Earlier "Written Agreement"	12
V. Balancing of Equities For Return of Funds Is Not Required in the Absence of A "Written Agreement"	15
Reasons for Granting the Petition	16
Conclusion	25

TABLE OF CITED AUTHORITIES

Page

Cases:

Arroyo v. United States
359 U.S. 419 (1959) 18, 19, 24

Brown v. C. Volante Corp.
194 F.3d 351 (2d Cir. 1999) 22, 23

Gariup v. Birchler Ceiling and Interior Co.
777 F.2d 370 (__ Cir. ____) .. 6, 14, 15, 16, 20, 21, 22

NLRB v. Iron Workers Local 103 (Higdon),
434 U.S. 335, 54 L. Ed. 2d 586,
98 S. Ct. 651 (1973) 14

Moglia v. Geoghegan
403 F.2d 110 (2d Cir. 1968), *cert. denied,* 89 S. Ct.
1193 (March 24, 1969) ... 7, 14, 15, 19, 20, 22, 23, 24

Moriarty v. Larry G. Lewis Funeral Directors Ltd.
150 F.3d 773 (7th Cir. 1998) 4, 7, 14, 21, 23

Operating Engineers Local 139 v. Gustafs on Construction Corp.
258 F.3d 645 (7th Cir. 2001) 14

Robbins v. Lynch
936 F.2d 330 (7th Cir. 1988) 6, 13, 14, 16, 22

UIU Severance Pay Trust Fund v.Local Union 18-U United Steelworkers of America
998 F.2d 509 (7th Cir. 1993) 2, 15

Cited Authorities

Page

United States v. Gruttadauro
815 F.2d 1323 (7th Cir. 1987) 17

William Dunbar Co. v. Painters and Glazers District Council
129 F. Supp. 417 (D.D.C. 1955) 20, 21

Statutes:

28 U.S.C. § 1254(1) 1

29 U.S.C. § 185 2

29 U.S.C. § 186 ..... i, 1, 17

Rule:

U.S. Sup. Ct. R. 14.1(f) 1

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Seventh Circuit Decided September 22, 2004 ..... 1a

Appendix B — Findings Of Fact And Conclusions Of Law Dated September 3, 2002 ..... 22a

Appendix C — Relevant Statute 35a

Appendix D — Stipulations Of Fact Filed September 17, 2003 ..... 39a

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is recorded at __ F.2d __ (7th Cir. 2004) (decided September 22, 2004, Appendix A) affirming a Decision of Magistrate Judge Martin C. Ashman of the United States District Court for the Northern District of Illinois, Eastern Division entered September 4, 2002, Appendix B, including Finding of Facts and Conclusions of law as well as a Judgment Order entered on the same date, the Decision is not reported.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(l).

The Seventh Circuit's Opinion was rendered on September 22, 2004. A timely Petition for Rehearing was filed by Appellant Banner Restorations, Inc. and denied on October 5, 2004. An application to Mr. Justice Stephens was filed by Petitioner Banner Restorations, Inc. for an extension of 60 days to file a Certiorari Petition. On November 19, 2004 this Court Granted Petitioner's Application for a 60 day extension of time to file its Petition for Certiorari to and including February 19, 2005.

STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 186

SUBCHAPTER IV – LIABILITIES OF AND RESTRICTIONS ON LABOR AND MANAGEMENT

The Provisions of 29 U.S.C. § 186 are lengthy and, therefore, set out in Appendix C, pursuant to Supreme Court Rule 14.1(f).

STATEMENT OF THE CASE

1. Petitioner Banner Restorations, Inc. hereafter Banner, seeks return of payments made to Respondents, Masonry Institute Bricklayers Local 21 Pension Funds made by mistake of fact or law based on a common law theory of restitution, a cause of action acknowledged by the Seventh Circuit in *UIU Severance Pay Trust Fund v. Local Union 18-U United Steelworkers of America*, 998 F.2d 509 (7th Cir. 1993). Petitioner seeks these monies as part of a timely filed Counterclaim to a routine request for an audit by Respondent Pension Funds. The claim of Petitioner arises as a result mandatory language in Section 302(c)(5)(B) of the Labor Management Relations Act (LMRA) 29 U.S.C. § 185 which in no uncertain terms mandates that (a) a "written agreement" required must be with a labor organization for ". . . the employee(s) of such employer" (Section 302(c)) the exceptions governing such lawful payments for which a "written agreement" is required must be ... *for the exclusive benefit of the employees of such employer* as set forth in subsection (B) ... which set forth. ... "the detailed basis on which such payments are to be made as specified in a written agreement with the employer ...". (App. C, 36a & 37a)

I. A Course of Conduct Cannot Substitute For the Mandatory "Written Agreement"

2. In this case the mandate of the Statute has simply not been fulfilled, and the Court of Appeal has committed clear error in its attempt to find a "course of conduct that manifests an intent to be bound. This is contrary to the clear statutory language in the absence of a "written agreement" between Banner and the Union that is the third party beneficiary of the Respondent. There never was at any time a "written agreement" which sets forth the detailed basis upon which such payments are to be made (normally contained in a signed

Collective Bargaining Agreement) with the particular employer and the labor organization representing that employer's employees. The undisputed facts in this case show Petitioner Banner never assented to a Collective Bargaining Agreement, when the Union and/or Trust Fund Representatives specifically asked him to sign.

3. Notwithstanding such refusal to become a signatory contractor the Union and Trust Fund Representatives (alter egos of each other, as they were the same persons) at the beginning of each job for construction restoration services on high rise buildings in Chicago (the work performed by Banner) de facto sought such agreement and threatened shut down of the job if union employees were not used and monthly reports showing Trust Fund payments for such union employees were not made.[3]

4. Trust Fund Representatives engaged in threats and coercion including actual picketing and threats to shut the job down by going to the customers for whom the restoration services were performed, either to the building managers or the owners. Threats were for the purpose of requiring Banner to

3. The uncontroverted testimony of Charles Ciancanelli, Jr. that the representatives who came to make coercive statements as stipulated in (Appendix D Stip. No. 23, (44a)) included Presidents of Bricklayers Local 21 Kenneth Lambert and Peter Marinopolous who each showed him their business cards showing they represented Respondent Trust Funds, as well as that they were Officers of Bricklayers Local 21. *See* Trial Transcript pages 113 Line 1 to page 115 Line 7) Even if the credibility finding of the Magistrate Judge is not overturned, the Judge only decided he did not credit the causal nexus between making the monthly payments and the stipulated coercive statements and picketing. Therefore such credibility finding does not diminish the uncontroverted testimony that the Union and Fund Representatives were alter egos for each other engaging in such coercive statements, including threats to neutral third parties to shut down the job if the monthly contributions to the Funds were not made.

use the union apprentice program (App. D, Stip. 21, 44a) to make monthly contribution reports and send in monthly checks to the Trust Funds (App. D, Stip. 29, 46a) even though a majority of Banner's employees were not members of the labor organization and even though the requirements of a written agreement with such labor organizations spelling out the terms of the agreement were never entered into, see footnote 9 of the Opinion of the Circuit Court herein acknowledging such fact and further acknowledging in the same footnote that the claim of the Respondent below in the Seventh Circuit that a certification of the monthly reports had been signed at some time by Banner was not of record (19a). The latter acknowledgment by the Seventh Circuit is consistent with footnote number 4 in the Decision of the Magistrate Judge which states "the March 1992 contribution report which allegedly contains Ciancanelli's signature, played no part in this Decision" (13a). Such alleged signed report was never produced by the Respondent and is not a part of the record.

5. The unsigned monthly reports coerced from Petitioner contain one or two legally deficient certifications not sufficient to create the "written agreement" mandated by Section 302(c)(5)(B) as the certification language fails to incorporate all the terms of a Collective Bargaining Agreement. Therefore even if a signed check, only included on 2 or 3 occasions constituted an "acceptance" it still could not create the requisite "written agreement as language of the certification itself was faulty apart from the fact it was never signed by Banner." The requisite language must incorporate all the terms of a Collective Bargaining Agreement.[4]

---

4. In *Moriarty v. Larry G. Lewis Funeral Directors Ltd.*, 150 F.3d 773 (7th Cir. 1998) The requisite "written agreement" mandated under Section 302(c)(5)(B) was found to be satisfied as a result of

(Cont'd)

6. The Seventh Circuit Panel in footnote 7 of the Slip Opinion (17a) addressing the certification language, in the instant case, as being deficient in incorporating by reference the necessary requirements under Section 302(c)(5)(B) that the "written agreement" failed to specify the detailed basis upon which payments are to be made. Nevertheless the holding of the Seventh Circuit that certain isolated conduct[5]

(Cont'd)
the employer having signed the monthly pension remittance forms which at the bottom contained language which states:

> ". . . hereby certify that the information contained in this report is true and correct, *and hereby agree to accept and abide by the terms . . . of the applicable Local 727, IBofT Labor Agreement and any amendments.*"

No such language is contained in the certification tendered and included with the one or two filings at the outset of this case, but in any case such certification was never signed by Banner which states: "I hereby certify that this is a report of all hours worked by bricklayers . . . the undersigned agrees to the term of payment to the Funds set forth in the applicable collective bargaining agreement . . ."

5. The "isolated" incidents relied upon at page 2 (2a) of the Slip Opinion of the Court of Appeals, that Banner would call the Local 21 Apprentice and Training Program to see if bricklayers were available was a part of the stipulated coercion visited upon Banner at the beginning of each job site (App. D, Stip. 29 (46a)).

Participation in 2 Joint Arbitration Hearings is similarly mischaracterized by the Court of Appeals as Mr. Ciancanelli came to such Hearing only to inform them that they had the wrong Banner Restorations and that Local 14 was a union involved in those proceedings other than Local 21. Also see footnote 6 infra showing admission against interest by Respondent admitting that what transpired in these Arbitration Hearings was as a result of a case of mistaken identity for which Petitioner Banner was not responsible.

(Cont'd)

by Petitioner manifests an intent to be found sufficient to meet the "written agreement" requirement of Section 302(c)(5)(B) is totally at odds with *all* of the prior Decisions of the Seventh Circuit in this area. In all those cases at some point earlier in time, there was in fact a written agreement entered into by the employer for his employees, either in the form of a letter of intent or being bound to a multiemployer bargaining agreement which were signed by the employer. The cases the Court cites in its Decision (8a) including *Gariup v. Birchler Ceiling and Interior Co.*, 777 F.2d 370, *Robbins v. Lynch*, 936 F.2d 330 (7th Cir. 1988), and the other cases cited in that same "string" cite are all cases in which there was a signed written agreement earlier in time. The language of the Seventh Circuit in those cases finds a course of conduct subsequent to the initial written agreement that creates a binding agreement but that does not support the holding in the instant case, where there is an absence of such earlier written agreement.

7. Petitioner Banner respectfully urges certiorari be granted, as the course of conduct relied upon absent a written agreement fails to satisfy the mandate of Section 302(c)(5)(B).

(Cont'd)
Thus findings of the Magistrate Judge to the contrary at paragraph 11 through 16 pages 26a through 27a and his conclusion at (32a) i.e. relying adversely to Banner's failure to respond to these very Joint Arbitration Decisions which were admitted in Court to be a matter of mistaken identity cannot be relied upon.

On a single occasion set forth at page 4 (4a) of the Slip Opinion Banner acceded to a Union audit is an example of another "isolated" incident. The final "isolated" incident recited by the Court of Appeals is Banner's agreement to donate a truck and driver to assist Local 21 in a matter involving another employer at the General Jones Armory.

Thus the only arguable course of conduct is Banner's monthly payment to the Funds under coercion absent a "written agreement".

II. There Is A Clear Conflict With The Second Circuit

8. The Decision of the Court below is in conflict with the Decision of the Second Circuit in *Moglia v. Geoghegan*, 403 F.2d 110 (2d Cir. 1968), *cert. denied*, 89 S. Ct. 1193 (March 24, 1969). The Second Circuit in *Moglia* recognized that ". . . receipt of such payments by an employee representative are absolutely prohibited unless there is a "written agreement" between the employer and the union which specifies the basis upon which the payments are made, 403 F.2d at 116 and *Moglia* goes on to conclude:

> Absent the written agreement, there is no valid Section 302 trust as to those employer contributions; the parties making and accepting such contributions are violating Section 302 and the intended beneficiary of the illegal contributions has no legal rights under Section 302 to benefits normally derived from employer contributions to the trust funds.

403 F.2d at 116. Even the Seventh Circuit acknowledged in *Moriarty v. Lewis Funeral Directors*, 150 F.3d 773 at 766:

> If . . . the contributions made on the Lewis' behalf are unlawful for lack of a contribution agreement (as mandated by Section 302(c)(5)(B)) they must be returned and the pension credits to the Lewis' account cancelled.

9. Petitioner respectfully asks the Court to grant certiorari not only because of the clear conflict in the Circuits but because of the overriding importance of this issue coming up time and again throughout the country as evidenced by the substantial number of cases, even cited in the Decision of the Seventh Circuit below that deal with this issue. We

respectfully suggest the Seventh Circuit has made dead letter of the mandatory language of Section 302(c)(5) in inferring a course of conduct absent a "written agreement".

III. All Relevant Facts Were Stipulated

10. The Trial before Magistrate Judge Ashman in the instant case occurred on a single day and was largely based upon a Stipulation of Fact between the parties attached as Appendix D to this Petition and the testimony of Charles R. Ciancanelli the President of Banner Restorations, Inc. and the testimony of his son the Construction Manager of the Petitioner. The Respondent Trust Fund put on no witnesses and relied only on the Stipulations of Fact and Respondents Exhibits introduced as part of the Pre-Trial Order.

11. The Stipulation was first tendered to Banner in Open Court by the Defendant (Respondent) prior to the taking of any testimony and after it was shown to Banner certain paragraphs were stricken and the parties initialed the deletions at each paragraph, (see paragraph 17 and part of paragraph 18 (43a), and written inserts such as paragraph 23 (44a)). We respectfully suggest that the Stipulation of Facts is the most significant part of this record because the Trial Judge discredited that the reason payments were made for a seven year period was due to coercion at the beginning of each job prior to the making of such payments. There was no testimony to the contrary. Paragraph 10 of the Stipulation makes clear that: ". . . Banner did not sign the Memorandum or Understanding or other Collective Bargaining Agreement with the District Council of Bricklayers Local 21. (41a)" (The relevant labor organization that is Third Party Beneficiaries of Respondent Pension Trust Fund) No claim was made by the Respondents that references in paragraphs 8 and 9 (41a) of the Stipulations referring to another Banner

Restorations, a sole proprietorship owned by Irwin Axelrod had any bearing on this case (41a). Nor was there any claim that Banner Restorations the Petitioner here, was a successor employer or in any way involved with the Banner-Axelrod company. A Pre-Hire Agreement with the Banner-Axelrod Company a sole proprietorship, was initially attached to the Complaint but abandoned as a basis for a "written agreement" here, at time of Trial. The references in paragraphs 11, 12, 13, 14 (App. D, 41a & 42a) relate to instances of Banner erroneously being called to an Arbitration Hearing involving the Banner-Axelrod Company, pursuant to arbitration provisions in the Banner-Axelrod Collective Bargaining Agreement which Petitioner Banner never assented to and to which it was a total stranger (41a, 42a). Moreover, those Hearings had to do with a labor organization other than Local 21. Petitioner Banner appeared at such Hearing only for the purpose of denying it was a signatory contractor and was wrongly served with papers, as it was a total stranger. The record evidence stipulated concerning those Hearings supports evidence of Banner's "Special Appearance" to deny jurisdiction over it by that Arbitration Panel.[6]

---

6. After hearing testimony in Open Court during the Trial of this case Counsel for Respondent Ms. Brannigan agreed that the District Council and the Unions which brought Petitioner Banner before them and issued the Arbitration Order asking Banner to make payments had the wrong Banner Restorations. The Court: (stated to Ms. Brannigan)

> Did your client confuse and make an error in that they thought that this Defendant here was Banner Restorations on a contract signed by Axelrod, and did your client make that error?

Ms. Brannigan:

> My clients believed that Banner Restorations, Inc. and Charles Ciancanelli were one in and the same as Banner Restorations.

(Cont'd)

12. Paragraph 17 of the Stipulation was stricken (43a). This striking on the face of the Stipulation is consistent with the finding of Magistrate Judge Ashman in footnote 4 of his Decision that such a document was never produced (31a). A signed contribution report of any kind was never produced. The striking of this paragraph 17 of the Stipulations is also consistent with the language of the Seventh Circuit in footnote 3 of the Slip Opinion acknowledging the erroneous claim of the Respondent Funds trying to resurrect the existence of a signed certification (10a).

13. The stricken sentence in paragraph 19 (43a) of the Stipulation that each employee of Banner was a member of Local 21, is consistent with the testimony of Charles Ciancanelli, Jr. that the Union at no time represented a majority of Banner's employees, and such testimony is consistent with Banner never having signed an agreement that the Union Represented a majority of its employees.

14. The coercion visited upon Banner at each job site is acknowledged in paragraph 23 of the Stipulation (44a). Credibility findings to the contrary, are contrary to the record.[7] Paragraphs 23 of the Stipulation of Fact states Mr. Ciancanelli, the President of the company was told:

(Cont'd)

The Court says:

Okay. They don't still think the same do they?

Ms. Branningan:

No.

Official Transcript of Proceedings of June 22, 2002, Transcript Page 105 Line 22 - Transcript Page 106 Line 5.

7. The Court of Appeals below is in error in its footnote 5 (12a) taking issue with Banner's efforts to distinguish the District Court's (Cont'd)

> That . . . he had to hire members of Local 21, had to pay the employees the contract wage rates, and had to contribute to the Funds on the employees behalf. Ciancanelli was told that if he did not do so the Union Representative would shut the job down and Local 21 would picket the job site.

(This in fact occurred at the 1000 Lake Shore Drive job site.) In addition to the above it was handwritten into the Stipulations and signed by the parties that:

> Ciancanelli states that they also said he had to sign an agreement which he refused to do.[8]

(Cont'd)

credibility finding for suggesting that Stipulation No. 29 (46a) does not on its face refute the credibility determination of the Magistrate Judge. When he held that he cannot believe . . . "that Ciancanelli as President (of Petitioner) made the monthly contributions to Respondent Funds *solely* in response to Local 21's threats of work stoppages and pickets . . .", (27a) Banner in good faith believed that all Stipulations of Fact agreed upon were determinative of those facts. (*See* footnote 8 *infra* for further explanation of same).

8. The circumstances surrounding the preparation of the Stipulations of Facts are set forth in Appendix D Footnote 1 (39a), Footnote 2 (43a) and Footnote 3 (44a) prepared by Petitioner.

The Form of the Stipulation in Stipulation No. 23 (44a) was drafted by Respondent's Counsel, The last line which states "Ciancanelli "states" that they also said he had to sign an agreement which he refused to do". Similar language was drafted by Respondent's Counsel in Stipulation No. 29 (46a) which starts with the words "Ciancanelli "asserts" . . .". We ask that this language be read together with other Stipulations of Fact that do not use the term "asserts" or "states", but favor Respondents Facts. Both parties stipulated to the correctness of each Statement of Fact as Facts not assertions or statements of that party otherwise a Stipulation of Fact would not be a Stipulation of Fact.

The Stipulation in paragraph 25 recites that Marinopoulos who was the President of the Union and a Trust Fund Representative "asked him to sign a Collective Bargaining Agreement which Ciancanelli refused ... (45a)"

15. Most importantly the Stipulation sets forth that Banner Restorations in paragraph 29 "submitted the monthly contribution reports and contacted Local 21 or the Local 21 Apprenticeship Training Funds for workers in response to threats by Local 21 Representatives to shut his job down if he did not do so (46a).

16. We respectfully suggest that in view of these matters having been stipulated to by the parties the fact that the Magistrate Judge chose not to credit the testimony of Mr. Ciancanelli and his job site Manager-son cannot be determinative. Their testimony only elaborated the matters contained in the Stipulation of Fact.

IV. The Seventh Circuit Erroneously Relied Upon A Course of Conduct To Support An Agreement In Reliance Upon Cases In Which There Was An Earlier "Written Agreement"

17. The Seventh Circuit erroneously relies upon *Robbins v. Lynch*, 836 F.2d 330 (7th Cir.) at 13a of its Opinion, which was predicated upon the employer there having earlier in time entered into a "written agreement". In *Robbins* the employer and the Union had earlier signed an actual agreement. In these circumstances finding that a threat to strike is not a defense in not apposite.

18. The Seventh Circuit erroneously relies upon *Robbins v. Lynch* at 13a of its Opinion in its effort to support its theory that conduct manifesting an intent to be bound can be drawn from a seven year period of contribution to the Funds, as

sufficient even absent entry or assent at any time to a "written agreement (13a)". We respectfully suggest in the circumstances where there is an absence of a "written agreement" at any time, the threats stipulated to here, in stipulation of Fact No. 29 (46a) as the reason for making such payments is a totally different circumstance than in *Robbins v. Lynch.* The mandate of Section 302(c)(5)(B) that there be a "written agreement" has clearly not been followed. The cases the Seventh Circuit has relied upon inferring the existence of such agreement are all cases where there was a written agreement at some earlier point in time in the case and the enforcement in *Robbins v. Lynch* of the contract was at a time subsequent to the earlier agreement.

19. In *Robbins v. Lynch*, Lynch Truck Service signed the National Master Collective Bargaining Agreement with the Teamsters in 1975 when it entered the business. The agreement expired in 1976 at which time Lynch executed a further agreement through the promise to be bound by any agreement thereafter included by the Local employer bargaining group. *Robbins*, 836 F.2d 330 at 331.

20. As the agreement was going to expire on April 1, 1979, Lynch sent a letter on March 29 to further adhere to the next National Agreement. Subsequently Lynch sent a letter indicating its desire to terminate the agreement but the Health and Welfare Funds continued to keep Lynch's employees on their rolls. (*Robbins*, 836 F.2d at 332) Lynch's defense to the Funds ERISA action was that it never signed the 1982 agreement, a subsequent agreement; that however, is a totally different circumstance than the facts in the instant case, where there never was a "written agreement" of any kind. *Lynch* as part of its defense alleged that the Union had threatened to strike if he did not include certain employees within the Pension Fund Contract. We suggest a threat to

strike when there is an ongoing labor relationship is totally different than a threat to shut a company down when they are total strangers as Banner is here, as it never assented to a "written agreement" and specifically refusing to sign an agreement when it was requested to do so. (*See* Stipulation of Fact No. 23, 44a).[9]

21. The facts in *Robbins v. Lynch* are typical of the facts in *Gariup v. Birchler* where there similarly was a prior written agreement. 777 F.2d 370 (7th Cir. 1985), and similarly in *Moriarty v. Larry G. Lewis*, 150 F. 3d 773, and *Operating Engineers Local 139 v. Gustafson Construction Corp.*, 258 F.3d 645 (7th Cir. 2001) The distinction that the Court below failed to acknowledge in attempting to distinguish *Moglia v. Geoghegan*, 403 F.2d 110 (2d Cir. 1968), *cert. denied*, 398 US 919, 89 S. Ct. 1193, 22 L. Ed. 2d 453, (1969) was its refusal to distinguish or acknowledge that its own *Gariup v. Birchler* decision 773 F.3d 370 at 375 (7th Cir. 1985)

---

9. In the instant case as stipulated in paragraph 23 of the Stipulation (44a) and paragraph 25 of the Stipulation (45a) the coercion to obtain an agreement would have been an agreement only condoned under Section 8(f) of the Labor Act in the absence of the Union representing a majority of the Petitioner's employees. In *NLRB v. Ironworkers Local 103 (Higdon)* 434 U.S. 335, 54 L. Ed. 2d 586, 98 S.Ct. 651 (1973) the Court held:

> Congress was careful to make its intention clear that pre-hire agreements were to be arrived at voluntarily and no element of coercion has to be admitted into the narrow exception being established by the majority principle . . . nor was it the intention of the committee to authorize a labor organization to strike, picket or otherwise coerce an employer to sign a pre-hire agreement as the majority status had not been established.

434 U.S. 348.

acknowledged that it agreed with the result in *Moglia* where the employer was making contributions to a pension fund that had failed to execute any type of written agreement evidencing its intent to be bound to a trust agreement. The Seventh in *Gariup v. Bichler* stated:

> We have no quarrel with the *Moglia* result however; the facts in *Moglia* are not similar to the facts in this case. In *Moglia* the court noted that the employer "had *never* entered into a collective bargaining agreement or a pension trust although the local had often requested it to do so.

Moglia, 403 F.2d at 114 emphasis in original quote *Gariup v. Birchler*, 777 F.3d 273. Thus we see that the Seventh Circuit in *Birchler* acknowledges the critical difference and why we ask this Court to accept the instant case for review in view of the conflict in the Circuits between this case and *Moglia*.

V. Balancing of Equities For Return of Funds Is Not Required in the Absence of A "Written Agreement"

22. We further respectfully suggest that consistent with the above holding in *Moglia* in circumstances where there never was a written agreement, as in the case at bar, the traditional equity balancing required in *UIU Trust* by the Seventh Circuit and by the Magistrate Judge below should not be applicable here for that was a circumstance where there was a written agreement the monies simply were deposited by mistake of fact or law and there was a balancing of equities to determine the equities of each side where however the monies are unlawfully kept by the Trust Funds contrary to the clear statutory mandate accordingly such monies simply must be returned.

REASONS FOR GRANTING THE PETITION

23. This case is of imperative public importance as the issue will arise many times in the future and the public policy of the Statute must be vindicated.

24. Review is necessary to resolve a conflict in the Circuits concerning strict construction of the written agreement requirement of Section 302(c)(5)(B).

25. We respectfully suggest that the Writ be granted here because the circumstances confronted by Banner Restorations, Inc. denying it the opportunity of a return of pension monies erroneously paid into the Funds by mistake of fact or law and retained by the Funds in the absence of a written agreement, mandated by Section 302(c)(5)(B) is contrary to the mandatory language of the Statute which this Court has never interpreted.

26. The Statutory mandate of Section 302(c)(5)(B) clearly has been abused by the Pension Funds in the instant case. The effort by the Seventh Circuit's Decision below to claim that a course of conduct can be established merely by the payment of monies for a seven year period into the Funds in the absence of a written agreement between the underlying labor organization that created the Fund obligations and this employer cannot be created on the facts shown here to be a course of conduct sufficient to infer or create an agreement by some sort of ratification.

27. The Decision by the Court below is totally contrary to the Decision of every other Seventh and Second Circuit Decision and extends the Seventh Circuit's Decision such as *Lynch v. Robbins* and *Gariup v. Birchler*, which all are circumstances where there was an earlier agreement at some time. Similarly all Seventh Circuit Decisions that we have

found, that infer a course of conduct are a circumstance where either there was a prior written agreement or the certification on the Monthly Contribution Report that the employer had signed, incorporates a full Collective Bargaining Agreement setting forth all terms and conditions of employment.

28. In the instant case a certification was never signed, an agreement was never entered into and significantly the facts from which the course of conduct is derived that the payments to the Funds coincided with amounts of payments in an area agreement not with Banner, coerced and "extorted" at the beginning of each job fails to meet the "written agreement" requirement in Section 302(c)(5)(B) and the Quid Pro Quo for such coercion has been stipulated to. (Stip. 25, 46a).

29. In *United States v. Gruttadauro*, 815 at 818 F.2d 1323 (7th Cir. 1987) the Seventh Circuit albeit in a criminal context affirmed a decision finding a Union Business Agent guilty of willfully receiving monies from an employer in violation of 29 U.S.C. § 186(b)(1)(d) (1982) a part of the same Section 302 involved here. In the *Gruttadauro* case similarly there never was a "written agreement". Hach the contractor in the *Gruttadauro* case, was similarly engaged in the concrete restoration business as is Banner in the instant case. *Gruttadauro* was a Laborer's Union Business Agent. Hach In the *Gruttaduro* case, like Ciancanelli in the instant case was asked to employ union members even though he had no contract to do so. The Court makes its Decision affirming a violation of Section 302 on its finding that:

> The record supports the government's position that *Gruttadauro* knew Hach's employees were not union members and that they never intended to be, moreover the jury reasonably could have found that given Gruttadauro's experience as a

> union business agent in the four acts charged in the indictment Gruttaduro' defense that he was fooled by Hach was not credible.

818 F.2d 1323 at 1329.

30. The overriding policies prohibiting the kind of conduct specifically mandated in Section 302(c) that if a written agreement is required with a labor organization before even dues monies or trust fund monies can be collected is equally applicable and equally serious and must be equally enforced in the circumstances of this case.

31. The public policy of the United States in this Statute articulated by this Court *Arroyo v. United States*, 359 U.S. 419 (1959) must be followed. The Court below in its Slip Opinion (14a, 15a) acknowledges the public policy of the United States expressed in the *Arroyo* decision.

32. The policy concerns of Section 302 being strictly enforced include concerns of "extortion by employee representatives" 359 U.S. 419, 425 to 426. We respectfully suggest that the Stipulated Facts in this case including threats made here that the job would be shut down, if payments were not made, notwithstanding the absence of a "written agreement" are akin to extortion and therefore violative of the public policies underlying the Statute as found by this Court in *Arroyo*. As in *Arroyo* the facts here are similarly undisputed.

33. The public policy concerns enforcing this Statute with the large number of cases which come up in every single jurisdiction concerning the "written agreement" mandate in Section 302(c) cries out for the granting of review. The court in *Arroyo* recognized that Congress in enacting Section 302 was attempting to deal with problems "peculiar" to Collective

Bargaining Agreements and the Federal Labor policy in light of experience acquired since the passage of the Wagner Act. 359 U.S. 419 L. Ed. 2d 915 79 S. Ct. 864 at 424 359 U.S. 424. Here rather than the special problems dealt with in *Arroyo* we have a situation where the Trust Funds have blatantly violated the statutory mandate and have not even introduced the Trust Indenture document which would clearly spell out the fact that such monies could not be obtained or retained from an employer absent a written collective bargaining agreement with that employer.

34. As in *Moglia* the monies here were kept improperly by the Trust Fund which must be presumed to know the law.

35. We respectfully suggest that monies absent a "written agreement", just as the Second Circuit held in *Moglia* cannot be retained and must be returned under the clear policy of Section 302(c)(5)(B), and the common law cause of action of restitution requires the same. *Arroyo* was concerned about monies being taken into the Funds "without specificity of the benefits payable thereunder". 359 U.S. 419 at 425 This case deals with the question of the return of the monies kept improperly. In either case the concern of improper use of the monies and alleged coercion in the nature of extortion to obtain it is contrary to the statutory mandate.

36. In *Moglia v. Geoghegan*, 403 F.2d 110 (2d Cir. 1968) a widow attempted to recover pension funds to which her husband would have been entitled because his employer contributed to the relevant fund for over 28 years. The Second Circuit held in *Moglia* that no recovery was possible because there was not the "requisite signed written agreement" under Section 302(a)(b) of the Labor Act. 403 F.2d 110, 113.

37. In the *Moglia* case the processing of the pension fund contribution request for the first time lead the Funds to investigate the eligibility for receipt of payment. The issue presented to the Second Circuit essentially was whether there was an entitlement to benefits by the widow absent a written agreement. The Second Circuit held that in light of Congress' clear intent set forth at 403 F.2d 116 and 118 that it was required under Section 302 that there exist a written agreement in order for the Trust Fund to be properly administered and in order for any monies to be paid out by a Pension Fund notwithstanding prior contributions.

38. The Second Circuit in *Moglia* did consider whether a written agreement could be inferred citing to *William Dunbar Co. v Painters and Glazers District Council*, 129 F. Supp. 417 (D.D.C. 1955) there such agreement in fact existed in the form of an unsigned Collective Bargaining Agreement which was attached to an unsigned Trust Agreement covering the Fund. In that matter according to the Appellant in that case the conduct and actions in observing the terms of the Collective Bargaining Agreement much like the position taken by the Court below here was tantamount to ratification and adoption of a written agreement, the Second Circuit did not agree. 403 F.2d 110-118 In *Dunbar* much like the analysis in *Gariup v. Birchler* the Second Circuit found as a fact that previously there had been a Trust Agreement and a signed copy of an agreement existed but the agreement had simply disappeared and could not be located, that was a circumstance that was distinguishable from the case in *Moglia* where there never was a signed written agreement. Accordingly, the Second Circuit held that where there was once an agreement as in the *Dunbar* case. Section 302(c)(5)(B) only required a written agreement and not a signed agreement and as there clearly was a written

agreement earlier in time that was sufficient. We ask this Court to come back to that same understanding as the Second Circuit correctly held in conflict with the Decision of the Seventh Circuit in the instant case.

39. In dealing with the *Dunbar* matter the Second Circuit correctly held:

> . . . ratification and adoption are only forms of acceptance of a contract and must conform to the general principles governing the formation of contracts. Two essential elements of contract formation are mutuality of agreement and mutuality of obligation. (See generally 7 CJS Contracts Section 1(1) (1962) (*Moglia v. Geoghegan* 403 F.2d 110, 118 (2nd Cir. 1968).

40. The Seventh Circuit Court below speaks of "a course of conduct" rather than adoption or ratification, we respectfully suggest it is doing the same thing that the Second Circuit specifically refused to do in analyzing a circumstance such as the one in the *Dunbar* case. It is also the same distinction we respectfully suggest that the Seventh Circuit had previously correctly made in *Gariup v. Birchler* showing a distinction between circumstance where there was an earlier signed agreement from circumstances where there never was an agreement. Significantly, the Seventh Circuit correctly held Section 302 required the return of monies by the Funds in circumstances where there never was a written agreement. (*See Moriarty v. Larry G. Lewis Funeral Directors Ltd., supra*, 150 F.3d 773 at 766).

41. We acknowledge that there is no requirement that the written agreement be a signed written agreement, but the written agreement does have to be with the employer of the

employees involved and there is no such written agreement here. A Court cannot simply accept as a written agreement an area agreement that is entered into by other employers or a multi-employer group with a labor organization but which this employer specifically refused to sign.

42. The Seventh Circuit below as did the District Court in the instant case, seems to believed that *Brown v. C. Volante Corp.*, 194 F.3d 351, 354-356 (2d Cir. 1999) holding that the conduct of an employer who did not sign two subsequent collective bargaining agreements but paid contributions and wages had rates prescribed by those agreements manifested an intent to adopt unsigned agreements. Slip Opinion (9a). *Brown*, however, we respectfully suggest for the very reasons cited is totally distinguishable from *Moglia* where there never was a written agreement and therefore cannot be held in any way to reverse or diminish the holding of *Moglia*. In the Second Circuit *Brown* is simply consistent with *Gariup v. Birchler* and *Robbins v. Lynch* where there likewise was an earlier written agreement.

43. The Court below erroneously attempts to use *Brown* as distinguishing *Moglia* (see end of footnote 8 on page 17 of its Decision addressing the question of the signature requirement) (18a).

44. The Seventh Circuit below seems to rely in large measure on the issue presented by Chief Judge Winter in *Brown v. Volante* as being authority for their Decision. However, the issue presented there is "whether Appellant manifested its intent to adopt the unsigned collective bargaining agreements" 194 F.3d 351 at 352. *Brown* contrary to Banner in the instant case in fact was signatory to a Collective Bargaining Agreement from July 1, 1987 to June 30, 1990 however did not sign two subsequent collective

bargaining agreements governing the period July 1, 1990 to June 30, 1996, *Brown* 194, 352 at 353. Moreover significantly in *Brown* identical to the language cited earlier in *Moriarty v. Lewis Funeral Directors, supra* had signed a certification which stated they were 'In accordance with the terms of the standard industry agreement with Local 282 IBT." That is language that is totally absent in the certification here. Moreover the certification here was never signed by Banner.

45. Most significantly in *Brown* contrary to the holding of the Court of Appeals below, Judge Winter in the *Brown* Decision in footnote 1 clearly distinguishes *Brown* from the Second Circuit's earlier Decision in *Moglia v. Geoghegan*, 403 F.2d 110 (2d Cir. 1968) holding that *Brown*:

> Is not contrary to *Moglia.* There, in (*Moglia*) we held that an unsigned, written agreement between a Union and a Fund did not comply with Section 302(c)(5)(B) when the Union and the Trust Fund "never had a signed collective bargaining agreement detailing the basis upon which the payments were to be made." 403 F.2d at 114, 115. We rejected a putative beneficiary's argument that its employer adopted the unsigned agreement on the facts of that case, the employer "did not appear to be willing to accept the terms of the unsigned collective bargaining agreement at any time" Id. at 118 we did not, however graft a signature requirement under Section 302(c)(5)(B) unlike the employer in *Moglia* Appellant's conduct manifested an intent to adopt the terms of the unsigned cbas.

We respectfully suggest that like in *Moglia*, Banner has never signed an agreement of any kind or adopted in any way, the

written agreement. The terms of the certifications were never signed, the terms of the certification did not include a detailed agreement and most significantly the payments were made under duress in the nature of extortion so Banner could keep working without the Funds going to the building representative to advise that Banner had to be removed from the job as it was not a union signatory contractor.

46. The language of Section 302(c)(5)(B) mandates a written agreement. There cannot be an inference of an agreement from a course of conduct which does not include assent to all the terms of an agreement for the employer's employees. The Decision in the instant case conflicts with the Second Circuit's Decision in *Moglia* which spells out the limited circumstances when an agreement can be inferred. It must be limited to circumstances where there was a prior "written agreement" To permit a course of conduct beyond that circumstance invites problems of extortion addressed by this Court in *Arroyo v. United States.*[10]

---

10. While Petitioner respectfully urges in support of question presented No. 3 that the affirmance of the District Court's credibility resolution is in error, alternatively we ask the Court to grant review notwithstanding the question of coercion, as the clear language of Section 302(c)(5)(B) that mandates a written agreement is a policy question of such overriding importance and upon which there is a clear conflict in the Circuits.

CONCLUSION

For all the aforesaid reasons Petitioner respectfully request that the Supreme Court grant Certiorari.

Respectfully submitted,

GERARD C. SMETANA*
SMETANA & AVAKIAN
39 S. LaSalle Street
Suite 1218
Chicago, IL 60603
(312) 357-0250

Attorneys for Petitioner

* *Counsel of Record*